

# **CONSTITUTIONAL ASSEMBLY**

## **MANAGEMENT COMMITTEE**

**MONDAY  
28 NOVEMBER 1994  
(11h00)**

**BOARD ROOM  
15TH FLOOR  
30 SIMMONDS STREET  
JOHANNESBURG**

***DOCUMENTATION***

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## **CONSTITUTIONAL ASSEMBLY**

### **MEETING OF THE MANAGEMENT COMMITTEE**

**Please note that a meeting of the above committee will be held as indicated below :**

**Date : Monday 28 November 1994**

**Time : 11h00 - 17h00**

**Venue : Board Room, 15th Floor, 30 Simmonds Street, Johannesburg**

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### **AGENDA**

- 1. Opening**
  - 2. Minutes: Pages 2 - 4**
  - 3. Matters Arising: See Agenda Items Below**
  - 4. Work Programme: See Separate Bound Document**
  - 5. International Mediation: Legal Opinion: Pages 5 - 10**
  - 6. Panel of Constitutional Experts:**
    - 6.1 Report: Pages 11 - 18**
    - 6.2 Legal Opinion: Pages 19 - 22**
  - 7. Any Other Business**
  - 8. Closure**
- 

**H EBRAHIM  
EXECUTIVE DIRECTOR  
CONSTITUTIONAL ASSEMBLY**

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***Enquiries : Ms MM Sparg, Room CS205, Tel 403 2274, Page 468 5316***

## CONSTITUTIONAL ASSEMBLY

### MINUTES OF MANAGEMENT COMMITTEE MEETING THURSDAY 17 NOVEMBER 1994 (AT 08H00)

#### PRESENT

#### RAMAPHOSA MC (CHAIRPERSON)

Chabane OC  
Eglin CW  
Felgate W  
Meshoe KR  
Meyer R

Moosa MV  
Van Breda A  
Viljoen C  
Wessels L

**Apologies:** None.

#### **In attendance:**

De Beer, S, Ebrahim H, Lilienfeld P, Meyer A, Matyolo L, Zondo L, Meyer L, Mngadi-Kgosidintsi T, Grové G, Powell D and Keegan M.

#### **1. OPENING**

- 1.1 Mr. Ramaphosa opened the meeting at 08h13. The Agenda was adopted.
- 1.2 Mr. Wessels extended the meeting's birthday greetings to Mr. Ramaphosa.

#### **2. MINUTES**

The Minutes of the meeting held on Thursday 10 November 1994 were adopted.

#### **3. MATTERS ARISING**

None - included in the Agenda Items below.

#### **4. INDEPENDENT PANEL OF EXPERTS**

- 4.1 Mr. Ebrahim spoke to the document entitled "*Independent Panel of Experts*," included in the documentation. Mr. Ebrahim noted that there was some urgency to the issue as there were budgetary implications that had to be dealt with in the immediate future and the

selected members of the panel were keen to learn whether their positions would be full- or part-time.

4.2 The meeting agreed that specific information would be gathered to guide Management Committee discussions on the matter:

- i. The Directorate would contact panelists to ascertain what each of their circumstances are and their views on terms of employment and report back to the Management Committee;
- ii. The Legal Advisors would provide the Management Committee a legal opinion on what the Constitution says about the panelists' role and function, including a definition of what "independent" means and their role in breaking deadlocks will be;
- iii. The political parties would prepare and submit to the Management Committee documents indicating their party's views on whether the panelists should be full- or part-time; and
- iv. The Directorate would examine the issue of how all the various experts would function, to avoid possible tensions arising.

The meeting agreed that these reports would be compiled and included in the Management Committee documentation pack to facilitate further discussion of the matter.

## 5. IFP PROPOSAL ON INTERNATIONAL MEDIATION

5.1 Mr. Felgate apologised for the misunderstanding which led to his late arrival. He then spoke to the document entitled "*Position Paper on International Mediation.*"

5.2 It is noted that the title format is misleading, as it gives the impression that the proposal is a Management Committee document, which is not the case.

5.3 After debating whether or not the proposal should be considered by the Constitutional Assembly, the meeting agreed to the following:

- i. The Legal Advisors would provide legal opinion as to whether this agreement was a matter which the Constitutional Assembly should deal with; and at the same time,
- ii. The matter was referred back to the three political parties involved in the agreement, with a request that they report back to the Management Committee.

**6. THEME COMMITTEES - WORK PROGRAMMES**

- 5.1 Mr. Ebrahim introduced the document entitled "*Theme Committee Work Programme*," included in the documentation, explaining that it was noting.
- 5.2 Gen. Viljoen suggested that a separate Theme Committee should be established on local government. The meeting agreed that this would be discussed when considering Theme Committee Work Programmes as a whole.

**7. AOB**

- 7.1 Mr. Ebrahim noted that he had received correspondence enquiring into the Constitutional Assembly's view on the Freedom of Information Act. The meeting agreed that his reply would be that the matter has not yet been discussed in the Constitutional Assembly.
- 7.2 It is noted that the Ambassador for the European Union contacted Mr. Wessels regarding assistance in setting up a conference. Mr. Wessels requested the Directorate to inquire into what organisations are organising conferences and to open communications between the groups.
- 7.3 Mr. Ebrahim repeated the meeting's birthday wishes to Mr. Ramaphosa.

**8. CLOSURE**

The meeting closed at 09h50.

# CONSTITUTIONAL ASSEMBLY

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REPUBLIC OF SOUTH AFRICA

REF NO:

## MEMORANDUM

**TO:** Management Committee  
**FROM:** Administration  
**RE:** Legal Opinion on International Mediation  
**DATE:** 23 November 1994

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The opinion of the Law Advisers on the IFP document on International Mediation requested by the Management Committee meeting of 17 November 1994 is attached.

**DECISION REQUIRED:** NONE

**INTERNATIONAL MEDIATION**

1.

We have been requested to evaluate the legal implications for the Constitutional Assembly of the claims which the Inkatha Freedom Party makes in the attached position paper on international mediation. In the position paper the IFP claims that the Constitutional Assembly is legally bound by a certain agreement known as the Memorandum of Agreement for Reconciliation and Peace which was entered into between the Inkatha Freedom Party, the African National Congress, the South African Government and the National Party on 19 April 1994.

2.

The Memorandum of Agreement opened the way for the IFP's participation in the April 1994 elections and contains clauses which the IFP insisted on as preconditions for its participation in the election. In clause 3 of the Agreement the parties agreed to recognise and protect the institution, status and role of the constitutional position of the King of the Zulus and the Kingdom of KwaZulu. These institutions were to be provided for in the provincial constitution of KwaZulu/Natal immediately after the said elections have taken place. It was further agreed to amend the Interim Constitution before 27 April 1994 in accordance with Addendum A to the Agreement in order to constitutionally sanction provision for the King of the Zulus and the Kingdom of KwaZulu in the provincial constitution of KwaZulu/Natal.

3.

The Memorandum of Agreement also refers to certain "outstanding issues" in respect of the King of the Zulus and the 1993 Constitution which in terms of clause 4 thereof are to be addressed by way of international mediation after the elections. This clause reads as follows:

"Any outstanding issues in respect of the King of the Zulus and the 1993 Constitution as amended will be addressed by way of international mediation which will commence as soon as possible after the said elections."

4.

The position paper states that the Memorandum of Agreement was at the time of its ratification and presentation to the press characterised by all parties to the Agreement as a solemn and legally binding agreement and that it was so intended and perceived.



5.

The position paper claims that because of the fact that the then South African Government was a signatory to the Agreement, Parliament, as the only organ of the Government which before the elections could amend the Interim Constitution as agreed in clause 3, was bound by the Agreement. Consequently, after the commencement of the Constitution on April 27 that portion of the South African Government's obligations in terms of the Agreement which relate to the time after the elections, viz. clause 4, is now binding on the organ of the South African Government which now has the constitutional power to fulfil the obligation. In terms of the Interim Constitution the organ of the South African Government charged with constitutional matters is the Constitutional Assembly which, in terms of the Agreement, is now under the obligation, so it is argued, "to consider the outcome of international mediation" before it proceeds with its task to draft the final Constitution.

6.

We do not consider it our task to express any opinion on whether the parties to the Agreement are bound by its terms, including clause 4. We confine ourselves to the issue which concerns the Constitutional Assembly, i.e. whether the Constitutional Assembly *per se* is bound by the Agreement, and particularly whether it is incumbent on the Constitutional Assembly to ensure that any "outstanding issue" contemplated in clause 4 is addressed by way of international mediation and also whether the Constitutional Assembly is under the obligation to structure and schedule its work programme to allow for the outcome of international mediation to be considered at the beginning of the constitutional debate.

7.

It is common cause that the Interim Constitution was amended before the elections as agreed by the parties in clause 3 (see Act 3 of 1994). The then State President, acting in terms of the previous Constitution, convened Parliament for a special session and the amending legislation was then duly passed by Parliament, the National Party as the dominant factor in Parliament honouring its obligation under the Agreement in supporting the legislation.

8.

It is trite law that the State President did not have the power under the previous Constitution to bind Parliament. In terms of the previous Constitution Parliament was a sovereign legislative body vested with a full and complete power to make laws for the Republic, and no court of law had the power to enquire into or question the validity of an Act of Parliament. Any action in a court of law for a mandamus against Parliament to pass legislation in accordance with an agreement entered into by the State President would have been absurd in the extreme.

9.

When the then State President signed the Agreement on behalf of the South African Government and the National Party, he did not and could not have had the intention to bind Parliament *per se*. As far as clause 3 was concerned he committed the Government to facilitating the holding of a special session of Parliament before the elections and to introducing in Parliament the amending legislation as agreed. He also committed his party, the National Party, to supporting the said legislation in Parliament.

10.

Clause 4 deals with certain matters to be attended to after the elections. From a legal point of view it is immaterial whether or not these issues have a bearing on the constitution-making process. Fact of the matter is that where it was not within the State President's competence to bind the then existing Parliament, it also fell outside his province to bind any future Parliament or constitution-making body.

11.

The Memorandum of Agreement is undoubtedly a document of great importance which was instrumental in paving the way to a peaceful election. As such it is politically relevant to the constitution-making process. But it does not and cannot legally bind the Constitutional Assembly to suspend its activities pending the outcome of international mediation on the matters stated in clause 4. Nor was it intended to bind the Constitutional Assembly.

12.

The Constitutional Assembly was established for the sole purpose of drafting and adopting a new Constitution for the Republic. In performing its task, it is bound only by the two principles set out in section 71(1), viz that the new constitutional text must comply with the Constitutional Principles contained in Schedule 4 and that it must be passed by the Constitutional Assembly in accordance with Chapter 5. An important provision of Chapter 5 is contained in section 73(1) requiring the Constitutional Assembly to pass the new constitutional text within two years as from the date of the first sitting of the National Assembly.

13.

Section 74(1) entrenches the Constitutional Principles and those provisions of Chapter 5 pertaining to the Constitutional Principles against any amendment whatsoever. As from April 27 these Principles became *sacro sanct* and neither Parliament nor the Constitutional Assembly has the power to change them. No negotiation between the parties, whether by way of international mediation or otherwise can have any effect on the mandate of the Constitutional Assembly as now fixed by the Constitutional Principles.

14.

When the parties signed the Memorandum of Agreement on the 19 April 1994 they must have been and were in fact aware of the provisions of section 74(1). They could therefore not have intended clause 4 to affect the mandate of the Constitutional Assembly as set out in the Constitutional Principles. If they had the intention that international mediation on particular issues should override the mandate of the Constitutional Assembly they would have made provision in the Agreement for the amendment of the Constitutional Principles at a time when these Principles could still be amended, i.e. before the elections.

15.

But clause 4 itself also gives an indication that that clause was never intended to affect the mandate of the Constitutional Assembly. The clause particularise the "outstanding issues" as issues in respect of the King of the Zulus and the 1993 Constitution.

16.

As far as outstanding issues in respect of "the King of the Zulus" are concerned, we must point out that the province of KwaZulu/Natal has in terms of section 160, read with Constitutional Principle XVIII(2), full power, and is in fact in terms of section 160(3)(b) under a constitutional obligation, to provide in its provincial constitution for the constitution, role, authority and status of the Zulu monarch. Outstanding issues relating to the Zulu King are therefore in the first instance matters to be attended to by that province when it drafts its provincial constitution.

17.

As far as outstanding issues in respect of "the 1993 Constitution" are concerned, these matters must be taken up by the parties in Parliament, because Parliament, and not the Constitutional Assembly, is the authority vested with the power to amend the Interim Constitution subject to section 74. As explained above the reference in clause 4 to the 1993 Constitution could not have been intended by the parties to refer to that part of the 1993 Constitution containing the Constitutional Principles, viz Schedule 4, as this Schedule became unamendable after 27 April. The Constitutional Principles cannot be the subject of further negotiation between the parties, whether by international mediation or in whatever other way. To the extent then that the 1993 Constitution can still be amended it is a matter for Parliament.

18.

The conclusion to which we come is that the Constitutional Assembly *per se* is not bound by the Memorandum of Agreement dated 19 April 1994 and that even if the Constitutional Assembly is under a moral or political obligation to take note of clause 4 of the Agreement, the "outstanding issues" referred to therein cannot have any affect on the mandate of the Constitutional Assembly as embodied in the

Constitutional Principles. This mandate is clear and the Constitutional Assembly must proceed with its task in order to pass a new Constitution within the timeframe set out in section 73(1).

**G H Grové SC  
M Ndziba**

**Law Advisers: Constitutional Assembly  
18 November 1994**

# CONSTITUTIONAL ASSEMBLY

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REF NO:

## MEMORANDUM

**TO:** Management Committee  
**FROM:** Hassen Ebrahim  
**DATE:** 24 November 1994  
**RE:** Meeting with the Independent Panel of Constitutional Experts

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A meeting was held between the Executive Director and the Independent Panel of Constitutional Experts on 22 November 1994. A copy of the minutes of the meeting is enclosed as is a memorandum submitted by the Independent Panel.

# CONSTITUTIONAL ASSEMBLY

## MEETING BETWEEN MEMBERS OF THE CONSTITUTIONAL ASSEMBLY ADMINISTRATION AND MEMBERS OF THE INDEPENDENT PANEL OF CONSTITUTIONAL EXPERTS

22 November 1994, Johannesburg (20:15)

### MINUTES

#### Present

#### Independent Panel:

Prof M G Erasmus  
Prof J Kruger  
Prof C Murray  
Adv I Semanya  
Prof J van der Westhuizen  
Adv Z Yacoob

#### CA Administration:

Mr H Ebrahim  
Mr G Grove  
Ms K McKenzie

#### 1 WELCOME AND OPENING

Mr Ebrahim opened the meeting and congratulated the members of the Panel on their appointment.

#### 2 STRUCTURE OF THE CONSTITUTIONAL ASSEMBLY

Mr Ebrahim outlined the structure of the Constitutional Assembly as:

- 2.1 *The Constitutional Assembly* (490 members) composed of the National Assembly and the Senate.
- 2.2 *The Constitutional Committee* (44 members + 2 Chairpersons): a substructure of the Constitutional Assembly facilitating the work of the CA between meetings.
- 2.3 *The Management Committee* (10 members + 2 Chairpersons): dealing with process.
- 2.4 *The Six Theme Committees* (30 members each): receiving and collecting submissions and tabling reports before the Constitutional Committee itemising contentious and non-contentious issues and

suggested approaches. Theme Committees are not negotiating fora.

The six Theme Committees as defined by the 5 September 1994 resolution of the CA are:

- Theme Committee 1 - Character of the Democratic State
- Theme Committee 2 - Structure of Government
- Theme Committee 3 - Relationship between Levels of Government
- Theme Committee 4 - Fundamental Rights
- Theme Committee 5 - Judiciary and Legal Systems
- Theme Committee 6 - Specialised Structures of Government

2.5 *Core Groups* (seven or eight members): Theme Committees are directed by Core Groups of seven or eight members and three Chairpersons who rotate.

2.6 *Technical Experts*: Each Theme Committee is entitled to utilise up to three technical experts to provide advice and legal expertise. Technical experts will play no role in drafting constitutional text.

No technical experts have been appointed as yet.

### 3 **PROGRAMME FOR THE DRAFTING OF THE CONSTITUTION**

Mr Ebrahim outlined the time framework for the drafting of the Constitution as set out in the CA resolution of 31 October 1994:

- 3.1 **30 June 1995:** Theme Committees complete their reports.
- 3.2 **14 July 1995:** Reports approved by the Constitutional Committee and Constitutional Assembly and text drafted.
- 3.3 **31 October 1995:** Full text placed before the public for scrutiny.
- 3.4 **May 1996:** Full text debated and adopted by the Constitutional Assembly.

### 4 **ROLE AND OPERATION OF THE INDEPENDENT PANEL**

Views on the role of the Panel were exchanged and the following was highlighted:

- 4.1 The Management Committee would table a legal opinion on the role of the Panel.
- 4.2 A decision on the full or part time nature of the Panel would have to be taken.

- 4.3 The Panel should solve deadlocks.
- 4.4 The Panel should be available in order for the CA to seek advice on any particular matter.
- 4.5 The Panel should ensure that the draft constitution does not conflict with the constitutional principles.
- 4.6 All documentation emanating from the CA and its structures should be availed to members of the Panel.
- 4.7 The Panel should be integral to the ongoing work of the CA in order to anticipate contentious areas.
- 4.8 Before text is placed before the Constitutional Court it should be tabled with the Panel.
- 4.9 In terms of section 72 of the interim constitution the Panels' duty is to advise on all matters pertaining to the CA. The Panel has a duty to advise when required to and when it felt that it was its duty to do so. The CA is not obliged to follow the advice of the Panel.
- 4.10 Protocol in the event of the Panel not reaching consensus on an issue should be agreed on amongst members of the Panel.
- 4.11 The Management Committee would consider the role and work of the Panel and its forthcoming meeting.
- 4.12 *It was agreed that the Panel would meet on 23 November to discuss its role further and a report would be submitted to Mr Ebrahim. Proposals regarding remuneration should also be submitted to the CA Administration.*



## MEMORANDUM

1. The following sums up our discussions. However, we would sincerely appreciate an opportunity to discuss these suggestions and to explain them more fully to the Management Committee. Our suggestion is that a meeting is set up on Monday, 28 November 1994 with two members of the Panel (Adv Zac Yacoob and Prof Johan van der Westhuizen).

Although we are fully aware of the busy schedule of MC members, we regard a short meeting as not only very necessary, but also really urgent in view of the need of some Panel members to make the necessary and timeous professional and personal arrangements which their membership of the Panel now requires. These arrangements are necessary also to accommodate employers and the interest of, for example, students and clients.

### 2. **ROLE AND FUNCTION OF THE PANEL**

- 2.1 The Panel derives its status from The Constitution which sets out its duties. The Panel, accordingly, has the responsibility to see these duties fulfilled.
- 2.2 In terms of Section 72(2), the primary role of the Panel is to advise the Constitutional Assembly or its chairperson on matters pertaining to the Constitutional Assembly's functions. The nature of the circumstances in which advice will be given and the extent of such advice may be varied and will be determined by the dynamics of the process as it unfolds. In addition, the Panel must "perform such other tasks as are provided for in this Constitution".
- 2.3 In terms of Section 73(3) the Panel must fulfil another function in the event of the Constitutional Assembly failing to pass a proposed draft of the new constitutional text by a majority of two thirds of its members. For present purposes, that function of the Panel is left aside.
- 2.4 The following list provides suggestions of the kind of issues on which the Panel may be able to offer advice to the Constitutional Assembly in terms of section 72(2).
  - 2.4.1 Whether particular parts of or the whole proposed constitution are/is compatible with the Constitutional Principles;
  - 2.4.2 Whether the technical formulations in the text truly and clearly reflect the prior agreements reached in the Constitutional Assembly;
  - 2.4.3 The consistency, appropriateness and accessibility of the proposed constitutional text;

2.4.4 The compatibility of constitutional proposals with international legal norms, and in particular, international human rights law.

2.4.5 The solutions offered by other jurisdictions on particular constitutional problems;

2.4.6 Problems raised in various Theme Committees may be the subject of Panel advice.

2.5 Acting in its advisory capacity, the Panel may also be able to offer advice on available and acceptable compromises in specific areas.

2.6 Again acting in an advisory capacity, the Panel may also be able to assist in resolving conflicts by suggesting procedures which may be appropriate from time to time.

### **3. PREREQUISITES FOR THE PROPER PERFORMANCE OF THE ADVICE-GIVING FUNCTION**

3.1 Advice given to the CA must be informed advice. Accordingly mechanisms must be set up to ensure panellists are kept abreast of developments in the process. In particular, relevant documentation must be supplied to every Panel member on a regular and structured basis.

### **3.2 LIAISON WITH THE CA**

3.2.1 Structured and regular liaison with the Chairperson of the CA or his delegate must be arranged;

3.2.2 Panellists must be able to attend meetings of any structure within the Constitution making process on a continuous basis for the purpose of gaining information;

3.2.3 Mechanisms should perhaps be developed to enable Theme Committees to approach the Panel for advice when required;

3.2.4 Advice from the Panel should probably not be available to individual members of the CA;

3.2.5 Panellists should be able to attend meetings and conferences where matters relating to their work are discussed and debated.

**4. PREREQUISITES FOR THE PROPER FUNCTIONING OF THE PANEL IN REGARD TO ITS ROLE IN TERMS OF SECTION 73(3)**

The success of the procedure envisaged in Section 73(3) will depend on the active involvement of panellists from the beginning of the constitution making process. Accordingly the prerequisites for the proper functioning of the Panel listed under 3 above are even more necessary if its role under Section 73(3) is to be successful.

**5. PROTOCOL WITH REGARD TO THE MEDIA**

Panellists agreed that they may make no statements to the media in relation to matters concerning the constitution making process without the express permission of the entire Panel.

**6. PROTOCOL WITH REGARD TO COMMUNICATION BETWEEN THE PANEL AND THE CA**

6.1 As a general rule the Panel proposes that it should work through the Director or Chairperson of the CA.

6.2 The Panel is of the opinion that it may be helpful to establish mechanisms whereby the Panellists can be consulted directly by Theme Committees. It suggests that such mechanisms should be set up by the Management Committee in consultation with the Panel.

6.3 The Panel will report on its work from time to time.

**7. TERMS AND CONDITIONS OF EMPLOYMENT**

7.1 All members recognise that their work as Panellists should and must take priority over all other professional commitments.

7.2 In the context of 7.1 it is recognised that it is impossible for those members of the Panel who are academics to be involved in normal academic work in a meaningful way during the life of the Panel. This is because University timetables, commitments to students and teaching replacements must be organised. Moreover, changes in lecturing arrangements have financial implications for Universities. Therefore, the availability of academic staff must be known to the University in an exact way by the end of November 1994. For this reason we believe that academic members of the Panel should be appointed on a full time basis.

If the Management Committee can suggest a practical way for part time involvement by academics, we would like to discuss this.

- 7.3 The Panel also recognises that professional activities of other Panellists will be severely restricted by the activities of the Panel. Nevertheless, it appears that, initially at least, Panel members who are not academics need not be involved on a full time basis. To ensure that such professionals can give priority to Panel work, an equitable arrangement concerning their remuneration will have to be reached. See 8.2 below.

## **8. REMUNERATION**

- 8.1 If an academic is engaged on a full time basis we assume that the budgeted rate for experts will apply.
- 8.2 As far as Panel members who are not academics are concerned, we suggest that representations should be made to the Director and Chairperson of the CA to enable remuneration to take account of their professional circumstances.
- 8.3 Reasonable travel and subsistence should be covered by the CA.

## **9. ADMINISTRATION AND BUDGET**

- 9.1 The Panel envisages that meetings and travel will have to be arranged and that minute-taking, general secretarial back-up arrangements for communication between Panellists and suitable office facilities in Cape Town will be necessary.

### **9.2 BUDGET**

9.2.1 The Panel envisages that there may be conferences, both in South Africa and elsewhere, which the CA would like members of the Panel to attend. Provision should be made in the budget for this.

9.2.2 Occasionally the Panel will require research materials not available in South African libraries. We suggest that a reasonable sum be set aside for this.

# CONSTITUTIONAL ASSEMBLY

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REF No:

## MEMORANDUM

**TO:** Management Committee  
**FROM:** Administration  
**RE:** Legal Opinion on the Panel of Constitutional Experts  
**DATE:** 23 November 1994

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The opinion of Law Advisers on the Constitutional provisions regarding the role of and functions of the Panel of Constitutional Experts, requested by the Management Committee meeting of 17 November 1994, is attached.

**DECISION REQUIRED:** NONE

**ROLE OF PANEL OF EXPERTS****1.**

We have been requested to express a view on how we see the role and functions of the panel of constitutional experts contemplated in section 72(2) of the Interim Constitution.

**2.**

Section 72(2) requires the Constitutional Assembly to establish an independent panel of seven South African citizens who are recognised constitutional experts, not members of Parliament or any other legislative assembly and not holding office in any political party -

- (a) to advise the Constitutional Assembly or its Chairperson on matters pertaining to the functions of the Constitutional Assembly; and
- (b) to perform such other tasks as are provided for in the Constitution.

**3.**

We understand the reference in section 72(2) to "other tasks" (paragraph 2(b) above) as referring to section 73(3) which confers a particular task on the panel. This section provides that should the Constitutional Assembly fail to pass a draft of the new constitutional text by at least a two-thirds majority as required by section 73(2), but such draft is supported by a majority in the Constitutional Assembly, such draft must be referred to the panel of experts for its advice. The panel is then required to propose such amendments to the draft as might in its opinion secure the two-thirds majority in the Constitutional Assembly. The panel must submit its proposals within 30 days to the Constitutional Assembly. If the Constitutional Assembly adopts the draft as proposed by the panel with the requisite majority, such draft shall then become the final Constitution. If it is not adopted a draft text approved by a majority in the Constitutional Assembly and certified by the Constitutional Court must then be referred to the electorate for a decision by way of national referendum.

**4.**

In determining the place and role of the panel of experts in the constitution-making process the rationale for the concept of a constitutional assembly is very relevant. The rationale is found in the Preamble to the Interim Constitution where it is stated that the "elected representatives of all the people of South Africa should be mandated to adopt a new Constitution in accordance with a solemn pact recorded as Constitutional Principles" and that an elected Constitutional Assembly must draw up a final Constitution.

5.

The intention is clear that the elected representatives should be actively involved in the actual development, drafting and adoption of the final Constitution. To this end they need the assistance of constitutional, technical and other experts which is provided for in section 72(1) and (2), but that does not mean that the experts should be the dominant factor in the writing of the Constitution or that the role of the elected representatives should be confined to endorsing or rubberstamping the ideas of the experts or involving themselves only superficially in the constitution-making process. To give effect to the spirit, purport and object of the Interim Constitution, the Constitutional Assembly and its structures composed of the elected representatives should at all times remain in active control of the constitution-making process.

6.

The panel of experts is not an internal substructure of the Constitutional Assembly. Section 72(2) requires it to be an "independent" body. In context we understand this to mean that the panel should be independent not only from outside political and other influence, but also in its relationship with the Constitutional Assembly.

7.

The panel of experts was undoubtedly intended to play a vital role in conflict-resolution and to assist the process with its wisdom and expertise should a deadlock in the Constitutional Assembly arise. And the likelihood of that happening cannot be ruled out as none of the parties has a two-thirds majority in the Constitutional Assembly. For this reason it is, in our view, imperative that the panel of experts should at all times uphold, and be seen to be upholding, its constitutional position as an independent "arbiter" to resolve any deadlocks that may arise in the Constitutional Assembly.

8.

In addition to its primary role as a conflict-resolution mechanism, the panel is also empowered to perform an advisory function. In this regard the panel can play a very useful role in its capacity as an advisory and consultative body for the Constitutional Assembly, its structures and the Chairperson, particularly as far as contentious matters having the potential to end in deadlock are concerned. We must, however, point out that section 72(2) does not authorise the panel to give advice *mero motu*. We cannot read the section as implying a "watchdog" function for the panel to intervene in the process whenever in the panel's opinion there is a need for its advice. The panel should therefore refrain from becoming involved in the daily business of the Constitutional Assembly otherwise than to the extent required of it. The panel should, in our view, at all cost protect its integrity and preserve its position as an objective and uncompromised arbiter.

**9.**

On the other hand, there may be a real danger that the panel might not be able to fulfil its obligation as a constitutional broker in the case of serious deadlocks if, for the sake of the preservation of its objectivity, the panel operates too isolated from the process. For this reason it is imperative that the panel should at all times be in a position to keep abreast of developments.

**10.**

A role which the panel can play without any danger of compromising itself on conflicting political positions, is to give authoritative legal opinions on conflicts within the process as far as the Constitutional Principles are concerned. There are going to be many disputes whether or not particular proposals are compatible with the Constitutional Principles and in our view the panel can play a particularly meaningful role here.

**11.**

In view of the above we are of the opinion that the way in which the panel is to be engaged as an advisory or consultative body, should be regulated by the Constitutional or Management Committee. Matters on which the panel's advice is sought, should be channelled through these Committees to the panel. The Chairperson, however, is in terms of section 72(2) entitled to seek the advice of the panel directly.

**G H Grové SC  
M Ndziba**

**Law Advisers: Constitutional Assembly  
18 November 1994**



